82-826

No. _____

Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES LEONARD WALKER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Walter Bilbro, Jr.
WALTER BILBRO & ASSOCIATES, P.A.
38 Broad Street
Post Office Box 687
Charleston, South Carolina 29402
803-722-7772

David H. Frackelton
WIDENER & FRACKELTON
Post Office Box 357
Bristol, Virginia 24203

Cody W. Smith, Jr.
SOLOMON, KAHN, SMITH & BAUMIL
Post Office Drawer P
39 Broad Street
Charleston, South Carolina 29402

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I.

Did the trial court err in receiving into evidence at Petitioner's trial the fruits and testimony of the stop, search and seizure of Petitioner and the motor vehicle he was operating when there was no evidence of probable cause introduced at the trial?

II.

Was Petitioner denied due process when the trial court failed to fully define and instruct the jury about the term "reasonable doubt", and thus erred in failing to charge Petitioner's requested Instruction H?

III.

Was Petitioner denied due process when the trial court failed to instruct and define the terms "not guilty" and "innocent" when the jury was deliberating possible verdicts, and thus erred in not charging Petitioner's requested Instruction C?

IV.

Did the Trial Court err in failing to dis-

miss the original arrest and search warrants because the issuing magistrate was not a neutral and detached judicial officer at the time she issued the warrants for she was also a correctional officer appointed by the lower court with law enforcement powers?

V.

Would the issuing of arrest and search warrants by a judicial officer who was also a correctional officer of the executive branch violate Petitioner's right of due process?

PARTIES

The parties are properly set forth in this Petition's caption.

III

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	1
REPORTS OF OPINIONS	3
JURISDICTION	3
CONSTITUTIONAL AMENDMENTS AND STATE STATUTES INVOLVED	4
STATEMENT OF THE CASE	9
ARGUMENT	21
CONCLUSION	44
APPENDIX:	
A. OPINION OF SUPREME COURT OF VIRGINIA	1
B. TRIAL COURT ORDERS AND RULINGS	
1. Ruling on Pretrial Motion To Disqualify Magistrate and Suppress Evidence	2
2. Ruling Admitting Evidence To Suppress Evidence at Trial Based on Warrantless Search and Seizure	4
3. Ruling Admitting Search Warrant and Attached Affidavit at Trial	16
4. Order of August 4, 1981	23

5. Order of October 14, 1981 29

6. Ruling Denying Instruction "C" 33

7. Ruling Denying Instruction "H" 35

C. OTHER APPENDED MATERIALS

1. Pretrial Motion to Disqualify Magistrate and Suppress Evidence 37

2. Exhibits At Pretrial Motion 39

3. Trial Transcript Dealing With Suppression Motions 44

4. Petitioner's Motion to Set Aside Verdict 62

5. Notice of Intention of Appeal 65

6. Trial Court's Instructions to Jury 66

7. Petitioner's Requested Instructions to Jury Lettered "C" and "H" 75

8. Search Warrants Issued by Magistrate 77

9. Arrest Warrant Issued by Magistrate 84

TABLE OF AUTHORITIES

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964)

Beck v. Ohio, 379 U.S. 89 (1964)

Bullington v. Missouri, 451 U.S. 430 (1981)

Carrol v. United States, 267 U.S. 132 (1925)

Chambers v. Maroney, 399 U.S. 42

In Re Winship, 397 U.S. 358 (1970)

Jackson v. Denno, 378 U.S. 368 (1964)

Lisenba v. California, 314 U.S. 219 (1941)

Miles v. United States, 103 U.S. 304 (1881)

People v. Garcia, Cal. Ct. App., December 29, 1975

Shadwick v. City of Tampa, 407 U.S. 345 (1972)

Sharpe v. United States, 660 F.2d 967

United States v. Bregoni-Ponce, 422 U.S. 873 (1975)

United States v. Di Re, 332 U.S. 581 (1948)

United States v. Ross, 456 U.S. ___, 102 S.Ct. 2157, 72 L.Ed.2d (1982)

Wong Sun v. United States, 341 U.S. 471 (1963)

Articles:

V. Bugliosi, Not Guilty and Innocent-The Problem Children of Reasonable Doubt, Crim. Just. J., W. St. U., San Diego (Copyright 1981).

Other Authorities:

The Code of Virginia (1950) Section 12.2-37

Fifth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

REPORTS OF OPINIONS

The opinions of the Supreme Court of Virginia handed down September 1, 1982, in Record Number 82006, Circuit Court No. 4-81-11, and the Orders of the Circuit Court of Washington County, Virginia, are unreported at the present time. The text of these opinions is set forth in the Appendix to this Petition.

JURISDICTION

The opinion of the Supreme Court of Virginia was decided and entered September 1, 1982. The jurisdiction of this Honorable Court is invoked by the Petitioner praying review of the decision of this highest appellate court of the Commonwealth of Virginia denying him relief because his Federal Constitutional rights had been violated in a criminal prosecution instituted by the Commonwealth of Virginia against Petitioner, a citizen of the United States and resident of South Carolina.

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

AMENDMENT IV (Article)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V (Article)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI (Article)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV (Article)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2... .

CODE OF VIRGINIA, 1950, AS AMENDED

SECTION 19.2-37

19.2-37. Who may be appointed magistrate. Any person may be appointed to the office of magistrate under this title subject to the limitations of chapter 4 (Section 2.1-30 et seq.) of Title 2.1 of the Code and of this section.

A person shall be eligible for appointment to the office of magistrate under the provisions of this title: (a) if such person or his spouse is not a law-enforcement officer or otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof...

CODE OF VIRGINIA, 1950, AS AMENDED

SECTION 15.1-48

15.1-48. Appointment of deputies; their powers; how removed. The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk of any circuit or city court may at the time he qualifies as provided in Section 15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law....

The sheriff may appoint as deputies such treatment and rehabilitation employees as are authorized and approved by the State Board of Corrections pursuant to Section 53-184 without approval by the State Compensation Board...

The officer making any such appointment shall certify the same to the

court in the clerk's office of which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court...

STATEMENT OF THE CASE

This case began on December 11, 1980, about 7:00 o'clock P.M. when Virginia State troopers stopped the Petitioner and the automobile he was operating and conducted a warrantless search and seizure of both without probable cause. On December 12, 1980, in the early morning hours, search and arrest warrants were issued charging that Petitioner on December 11, 1980, possessed Methaqualone and marijuana with intent to sell. (See Appendix C (8) and (9)) A preliminary hearing was held, and on April 14, 1981, the Grand Jury of Washington County, Virginia returned a true bill on a two count indictment.

The Petitioner was tried before a jury on August 4, 1981. The day before, the trial court heard Petitioner's suppression motion challenging Fonda B. Smith's ability to perform a judicial officer's function when she signed the search and arrest warrants and handled other preliminary matters

pertaining to his arrest and jailing. (See Appendix C (1)) This motion to suppress evidence was based on Fonda B. Smith's inability to perform a judicial officer's function because she was simultaneously holding a prior appointment as a correctional officer for Washington County. (See Appendix C (2)) The Motion was denied by the Court. (See Appendix B (1))

At trial, evidence leading to the Petitioner's arrest was presented by the Commonwealth's witnesses, Virginia State Troopers, James E. Asbury and R. L. Givens. The testimony recited that Trooper Asbury of the Virginia State Police began his initial investigation into events surrounding the arrest of the Defendant prior to December 11, 1981. On December 11, 1981, Asbury received a phone call from an informant. Thereafter, a State Police Surveillance Team was sent to the Abingdon, Virginia area. This team had been directed to check all local motels in the Abingdon area for

out-of-state vehicle licenses, preferably automobiles displaying South Carolina tags. No further description had been given for occupants of any suspect vehicle, and no description or any identifying information of the type or make of vehicle had been provided to the troopers.

A 1975 Mercury vehicle bearing Florida license tags was located at the Empire Motel. Trooper Givens together with Trooper Lilly began surveillance at the Empire Motel about 6:00 P.M. on December 11th. The troopers positioned themselves so that they could observe this vehicle later identified as a 1975 Mercury Coupe owned by John Joseph Fickett, Jr. After watching this vehicle for about 30 to 45 minutes, two males exited a motel room and came to the vehicle, opened its truck, and removed a brown paper bag with one of the subjects, later learned to be Walker, carrying the paper bag. The two returned to the room on the second level of the motel with the brown

paper bag in their possession. Trooper Givens testified the bag removed from the vehicle's trunk appeared to be a grocery bag with no evidence of contraband.

Trooper Givens later saw the same two subjects, whom he did not know by name at that time, leave their motel room, come directly to the Mercury automobile, and get into the front seat. When the two subjects returned to the automobile from the motel room, neither was carring personal baggage, a brown paper bag or any other personal container with them, and further, neither subject went into the trunk of the automobile. The Mercury vehicle was then driven away from the motel.

The subjects proceeded from the motel onto U. S. Highway 11 where they were stopped after traveling several miles by a waiting uniformed State Trooper. The Mercury vehicle committed no traffic violations prior to the stop, and the vehicle pulled over and stopped on the roadside in a

routine fashion. The subjects made no attempt to escape when the State Troopers pulled them over, and they did not do any overt acts which warranted their stop and detention.

Trooper Asbury testified that the only reason the 1975 Mercury automobile was pulled over was based on information that he earlier received from an informant. No evidence or testimony was received at trial to show what detailed, believable and reliable information, if any, had been provided to any law enforcement officials prior to the stop and warrantless search of the Mercury automobile, its two occupants, and its contents. Nothing was presented into evidence to establish the believability of this information. (See Appendix C (3))

After the vehicle's stop, Trooper Asbury with six policemen converged and found the driver to be the Petitioner. A Mr. Fickett was the front seat passenger and later determined to own the vehicle. The

troopers searched the vehicle's two occupants for weapons, and at Asbury's instructions, the Petitioner produced his driver's license, and Fickett the vehicle registration. Asbury advised the occupants he had information they were transporting Methaqualone and possibly marijuana, and he was conducting a warrantless search of the vehicle as the result of the information. Walker and Fickett were detained by other members of the surveillance team. The vehicle nor its occupants were free to leave.

The troopers searched the passenger compartment, but found nothing. Trooper Asbury then had Trooper Gregory with his narcotics dog to further assist him in the warrantless search. The dog was first exercised in nearby bushes and then was taken to the front of the Mercury automobile. Both doors to the passenger compartment as well as the locked trunk were opened by the troopers. The narcotics dog walked completely around the car but did not alert on

anything. The dog was then placed in the passenger's compartment where it conducted a full search and found nothing of interest. The troopers accompanied by the dog then went to the vehicle's trunk which the troopers had opened. By then considerable time had elapsed.

At trial, Petitioner then objected to testimony after the troopers opened the trunk without a warrant because there had been no foundation laid by the Commonwealth for conducting a warrantless search of the vehicle. Petitioner further amplified this objection to object to any testimony about any investigation eminating from the opening of the trunk and its search. These were continuing objections throughout the trial. (See Appendix B (2))

Over Petitioner's objections, Trooper Asbury testified that there were no drugs or drug paraphernalia in plain view; however, he did see personal luggage and containers including a rolled up brown paper

bag in the trunk. The dog while outside of the trunk did not alert, however, upon being placed in the trunk by the handler, the dog began scratching at and tore the brown paper bag.

The rolled up brown paper bag was removed by Trooper Gregory from the Mercury's trunk and handed to Asbury. It was then that Asbury observed a rip in the side of the bag through which he could see white tablets which he believed to be Methaqualone tablets. Trooper Asbury testified that during their entire surveillance and during the course of the stop and search, no drug related violation up to this point was open to plain observation and view. Asbury testified he took custody of the bag, opened the bag's top and examined its contents. He found drugs and a revolver.

Trooper Asbury walked over where Mr. Walker and Mr. Fickett were being detained by other members of the police team, apprised them of what he had found in the

brown paper bag, and placed them under arrest. There were other items in the trunk, to-wit: a large brown trash bag which appeared to contain a box, a brown suit case, a green backpack, and a dog food bag. Walker and Fickett were asked to consent to a search of the these materials in the trunk. After interviewing Mr. Walker and Mr. Fickett about the ownership of the items contained in the trunk, Trooper Asbury ascertained that Mr. Walker only owned the green backpack, and the remaining items were acknowledged to be owned by Mr. Fickett. Walker and Fickett declined to sign a consent to search form, and Trooper Asbury advised them that a search warrant would be obtained for the unsearched items in the trunk. The Commonwealth was allowed to introduce the brown paper bag and its contents together with the box and its contents into evidence over Petitioner's continuing objection. (See Appendix B (2))

The automobile, its contents, its

occupants, and the police entourage then went to the Washington County Jail in Abingdon, Virginia. The magistrate subsequently issued the search warrant requested by Tooper Asbury. Pursuant to this warrant, Trooper Asbury broke open and searched the contents of the unsearched articles in the Mercury automobile's trunk. The search of the box contained in the garbage bag turned up a quantity of Methaqualone tablets.

At trial, Petitioner objected to the introduction into evidence of the search warrant and its affidavit together with the results of any search conducted thereafter because there had been no foundation to show that the Commonwealth's police had believable and reliable information which was lawfully obtained to establish probable cause upon which to apply for and to receive the search warrant. The Petitioner further objected to the introduction of the search warrant and affidavit into evidence on the ground there was no testimony in evidence

about the scope and freshness of the information received from the informant or the credibility of his information. (See Appendix B (3))

On the close of the Commonwealth's case, Petitioner's Motion to Strike the Evidence and to discharge him was made. The court denied the Motion, the Petitioner rested his case, and again renewed his Motion to Strike the Evidence and discharge him. The court denied this Motion.

At the close of trial, the Commonwealth and Petitioner submitted jury instructions to the trial judge. The court then charged the jury. (See Appendix C (6) for the complete charge.) Two lettered instructions offered by the Petitioner defining and instructing the jury on the terms, "guilt", "innocence", and "reasonable doubt" (See Appendix C (7) were refused by the court. (See Appendix B (6) (7)) Petitioner expanded the objection to include that the court was prohibiting his right to have

the jury given full and proper instructions on his legal theories of the case. The court maintained its ruling.

The jury heard the court's instructions and argument of counsel. The jury deliberated and returned guilty verdicts on both counts. The court advised the Petitioner could make written motions to set aside the verdict prior to the time of sentencing. (See Appendix B (4)) A Motion to Set Aside the Verdict was duly filed and argued. (See Appendix C (4)) The court denied the motion. (See Appendix B (5)) The Petitioner then filed a Petition for Appeal to the Supreme Court of Virginia. (See Appendix C (5)) The Petition was denied on September 1, 1982. (See Appendix A) The Petitioner is presently incarcerated pursuant to this sentencing Order of October 14, 1981. (See Appendix B (5))

ARGUMENT

I.

DID THE TRIAL COURT ERR IN RECEIVING INTO EVIDENCE AT THE PETITIONER'S TRIAL THE FRUITS AND TESTIMONY OF THE STOP, SEARCH AND SEIZURE OF PETITIONER AND THE MOTOR VEHICLE HE WAS OPERATING WHEN THERE WAS NO EVIDENCE OF PROBABLE CAUSE INTRODUCED AT THE TRIAL?

The Supreme Court's decisions have held that police officers, in the absence of a warrant, may stop and search an entire vehicle under the automobile exception to the Fourth Amendment, if the search of the whole vehicle is made upon probable cause justifying that extensive a search. Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. at 42. The scope of a legitimate warrantless search is to be confined to the object of the search and the place in which there is probable cause to believe that it may be found. United States v. Ross, 456 U.S. ____, 102 S.Ct. 2157, 72 L.Ed.2d (1982). The seizing

officer must have reliable, adequate information that the automobile somewhere contains in its premises that which by law is subject to seizure. Carroll, Supra at 149.

> "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." Ross, Id. at 2172.

In Ross, the trial record established that the officers were acting upon information from a reliable informant who stated he had just observed Ross complete a sale of narcotics from the trunk of his car and had heard Ross say that additional narcotics were in the car. The informant then gave the officers a detailed description of Ross and the automobile he was driving. The officers immediately drove to the area designated by the informant, located the described person and car, and proceeded to stop and search the entire automobile. The

officers found drugs in the trunk as the informant has apprised them. Id. at 2168, n. 22.

In Petitioner's case, the Virginia State Troopers' reasons for stopping and conducting a warrantless search of Petitioner and the automobile he was driving were not supported by probable cause in the trial record. The record reflects that Petitioner was never seen to place anything into the trunk or the passenger compartment of the car prior to the stop and detention. Trooper Givens testified that he saw two subjects remove a brown grocery bag from the trunk of the car located in the motel parking area and take it into a room. Shortly thereafter, the subjects returned to the automobile emptyhanded, immediately entered the passenger compartment, and drove off. There was no testimony as to any reliable, credible information in the troopers' possession describing the automobile or the nature of contraband it might contain. No evidence

set forth any detailed description of persons bringing the drugs.

No prior traffic violations by Petitioner had occurred when the uniformed Virginia State Trooper stopped him while driving towards the state line. In fact, the automobile was stopped because of alleged information received from an alleged informant, none of which was introduced at trial. The trial record is silent about any information in possession of the informant or troopers as to the existence of any contraband, the nature of any contraband, whether any contraband was in the Petitioner's possession at the time, whether any contraband was in the possession of Petitioner's companion at the time, or if any contraband was in a 1975 Mercury Coup with Florida tags in which Petitioner was traveling.

The troopers conducted an unlawful investigatory stop and warrantless search of the Petitioner, the passenger compartment,

the trunk, and a closed brown paper bag in the trunk of the automobile Petitioner was driving which included the use of a specially trained narcotics' dog, all in the absence of facts indicating sufficient probable cause. The fruits of the officer's search and seizure should have been excluded from evidence when Petitioner objected to their introduction at trial.

Sharpe v. United States, 660 F.2d 967, held that a law enforcement official may stop a moving vehicle without a warrant and for less than probable cause, but imposed two pre-stop requirements. First, that the detaining officers possess a reasonable suspicion of illegality supported by articulable and objective facts, and second, that the stop must be cursory and brief. The brevity requirement is especially important the court continued, "for it is the transitory nature of the stop that justifies the elimination of the probable cause requirement." Id. at 969.

In Sharpe, the police stopped two vehicles that they suspected of transporting drugs. They then held the occupants while they asked questions, obtained identification, and inspected the outside of the vehicles. By the time one of the officers smelled the strong oder of marijuana eminating from one of the vehicles and decided to take the entire entourage in for further investigation, forty (40) minutes had expired.

There is no evidence on the trial record that would give rise to a reasonable suspicion based upon articulable and objective facts, and this record will further indicate that due to the lengthy sequence of events subsequent to the stop, the brevity requirements in Sharpe were exceeded. After stopping the automobile without finding anything on the occupants or in plain view in the automobile, any further detention or search of Petitioner and the automobile he was driving must be based upon consent or

probable cause. United States v. Bregoni-Ponce, 422 U.S. 873 (1975).

To establish probable cause based upon an informant's tip, the prosecution must show "underlying circumstances" sufficient to support the informant's conclusions and the conclusion of the police that the informant "was 'credible' or his information 'reliable'." Aguilar v. Texas, 378 U.S. 108, 114 (1964).

Beck v. Ohio, 379 U.S. 89 (1964), held that specificity as to what the informer actually said and why the informer and his information were thought to be credible and reliable must appear on the record in order to establish probable cause for arrest without a warrant. The arresting officer in Beck testified he had information and had heard reports from someone he knew to be reliable that Petitioner had a record in connection with a clearing house and schemes of chance. There was no testimony that the informer had said the person could be found at

the time and place where the arrest was made and the record was silent as to any objective facts to support a belief that Petitioner had acted or was then acting unlawfully. The officer testified only that he had information, that he had heard reports, that someone specifically did relate that information, and that he knew who that person was. There was never any indication as to the contents of the information and reports the officer had received. Beck went on to say that "no decision of this court has upheld the constitutional validity of a warrantless arrest with support so scant as this record presents." Id. at 95.

The facts in Beck stand on all fours with Petitioner's contention on appeal. The arresting officers lacked probable cause as shown by the trial record to conduct a stop and legitimate warrantless search of the Petitioner, the passenger compartment, locked trunk, and personal container in the trunk of the automobile which

Petitioner was driving. Accordingly, all evidence obtained from the illegal stop, search and seizure must be excluded as fruits of the poisonous tree. Wong Son v. United States, 341 U.S. 471, 83 S.Ct. 407 (1963).

We anticipate the Commonwealth will attempt to correct the warrantless illegalities by saying the arresting officer, subsequent to the stop, search, and use of the narcotics dog, obtained a warrant before any further search of the innocuous appearing personal articles located in the trunk of the car. This argument fails due to evidence giving rise to probable cause being the fruit of the illegal warrantless search. The warrant and attached affidavit will show that it was admittedly the contents of the closed brown bag secured in the locked trunk of the automobile that led the arresting officers to believe that probable cause existed for the issuance of a warrant. The officers then sought and obtained

blanket permission by search warrant to search the whole car and those remaining articles of interest in the trunk of the vehicle. The evidence seized in each search must be surpressed, and the evidence derived therefrom excluded.

II.

WAS PETITIONER DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO FULLY DEFINE AND INSTRUCT THE JURY ABOUT THE TERM "REASONABLE DOUBT", AND THUS ERRED IN FAILING TO CHARGE PETITIONER'S REQUESTED INSTRUCTION H?

At the close of the trial, the trial court charged the jury:

> "The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case." See Appendix C (6))

The above quoted instruction was the trial court's only effort to explain reasonable doubt. When Petitioner sought to have the court give his instruction defining reasonable doubt, the trial court refused stating it was repetitious of what had been granted. (See Appendix B (7)) Petitioner's requested instruction recited:

"Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" People v. Garcia, California Court of Appeals, December 29, 1975.

It is Petitioner's contention that the aforesaid Instruction fails to put forth a definition of reasonable doubt. Here, the

court instructs the jury in the negative stating that "This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceiveable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction." The Instruction given by the court barely touches the scope of the legal term, "reasonable doubt." Not once did the trial court attempt to establish a clear definition of the term which the jury could use in its deliberations.

The United State Supreme Court in In Re Winship, 397 U.S. 358, (1970), stated it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. "It is also important in our free society that every individual going about his ordinary affairs have confidence that its government cannot adjudge him guilty of a criminal

offense without convincing a proper fact finder of his guilt with utmost certainty." Id. at 364.

The court in Miles v. United States, 103 U.S. 304, found reasonable doubt to be "such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient." Id. at 309.

The trial court's failure to explain reasonable doubt to the jury allowed it to supply an unknown standard of proof to the evidence. The term "reasonable doubt" carries great significance in a criminal trial, and we cannot expect its legal definition to be supplied by lay jurors based on common usage. The trial court's failure to explain "reasonable doubt" effectively denied the Petitioner the indisputable component of every criminal trial, the yardstick with which to measure the evidence.

III.

WAS THE PETITIONER DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO INSTRUCT AND DEFINE THE TERMS "NOT GUILTY" AND "INNOCENT" WHEN THE JURY WAS DELIBERATING POSSIBLE VERDICTS, AND THUS ERRED IN NOT CHARGING PETITIONER'S REQUESTED INSTRUCTION C?

The Petitioner requested the trial court instruct the trier of fact as follows:

> "The term 'not guilty' is not synonomous with 'innocence'. In our system of criminal justice, the term, 'not guilty' means that the Commonwealth did not prove that defendant guilty beyond a reasonable doubt of each element of an offense; 'not guilty' does not mean that you must find the defendant 'innocent' of the crimes with which he was charged. The charges were simply not proven by the Commonwealth." (See Appendix B (6))

It is elementary that the function of the trier of fact is not to decide whether a criminal defendant did not commit the crime, but to determine whether or not the prosecution has met its burden of proving the defendant's guilt beyond a reasonable doubt. In a criminal trial, "not guilty" and "innocence" are frequently erroneously used

interchangeably by courts and legal counsel.[1] This results in the jury being misled and confused from time to time. Common usage of the word "innocent" as with the word "guilty" denotes a specific factual discription of a reality. "Innocent" factually describes a man who did not commit the crime. "Guilty" factually describes the

1 In the recent 1981 case of Bullington v. Missouri, 451 U.S. 430 (1981), United States Supreme Court Justice Powell wrote:

> "Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accuser first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover the truth according to law."

Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court declared the function of the criminal trial jury is "adjudicating guilt or innocence." The court then referred to the erroneous determination of "guilt or innocence" on other occasions throughout the Jackson opinion.

person who committed the crime. "Not guilty" is the legal finding by the criminal trial jury that the state has not met its burden of proof. A guilty verdict by a jury is a legal finding that the prosecution has met its burden of proof.

"Innocent" is not one of the possible verdicts which a jury may return at the trial of a criminal case. A criminal trial jury may find the defendant "guilty" or "not guilty" but may never find the defendant "innocent". To afford the defendant a fair trial, the criminal trial jury must be instructed adequately and correctly on the meaning and import of the possible verdicts. It should also be instructed to avoid confusion between the terms "not guilty" and "innocence".

The jury may find a criminal defendant not guilty from either of two states of mind on the evidence received in the trial, to wit, the jurors may believe the defendant is factually innocent of any wrongdoing in the

crime for which he is charged, or the jurors do not necessarily believe the defendant is factually innocent and may even tend to believe that he committed a crime, however, the evidence as a whole is insufficient to persuade them of the defendant's guilt beyond a reasonable doubt. Under the American Criminal Jurisprudence, a jury must find a defendant not guilty even when they are in such a state of mind that they believe the defendant is guilty by a preponderance of the evidence (the civil standard of proof), but do not believe the defendant has been proven guilty beyond a reasonable doubt (the higher criminal standard of proof). V. Bugliosi, Not Guilty and Innocent-The Problem Children of Reasonable Doubt, Crim. Just. J., W. St. U., San Diego (Copyright 1981).

No where in the trial court's charge did it cover or define the legal principals of "not guilty" and "guilty", nor did he distinguish the term "not guilty" from the

term "innocence". The term "innocence" was used repeatedly throughout the court's charge when it instructed the trial jury on the presumption of innocence.

Petitioner's requested Instruction supports his theory of the case for he does not deny being present at the time the vehicle was stopped and searched; however, Petitioner at his trial denied and demanded proof beyond a reasonable doubt that he was criminally connected with contraband. He is entitled to an instruction articulately explaining to the jury that its function is not to determine Petitioner's guilt or the innocence, but to only determine whether or not the prosecution has proven guilt beyond a reasonable doubt. The failure of the lower court to see the importance of such a timely instruction either misinstructed the jury or allowed it to wander away from its central function in a criminal trial because it lacked sufficient instruction by the trial court.

IV.

DID THE TRIAL COURT ERR IN FAILING TO DISMISS THE ORIGINAL ARREST AND SEARCH WARRANTS BECAUSE THE ISSUING MAGISTRATE WAS NOT A NEUTRAL AND DETACHED JUDICIAL OFFICER AT THE TIME SHE ISSUED THE WARRANTS FOR SHE WAS ALSO A CORRECTIONAL OFFICER APPOINTED BY THE LOWER COURT WITH LAW ENFORCEMENT POWERS?

At the pre-trial hearing, Petitioner made a motion, through counsel, to dismiss the original arrest and search warrants because the issuing magistrate, Fonda B. Smith, was not a neutral and detached judicial officer at the time she issued the warrants. This motion was made pursuant to Section 19.2-37 of The Code of Virginia, 1950, as amended, which states in part that "A person shall be eligible for appointment to the office of magistrate under the provisions of this title; (a) if such person or his spouse is not a law enforcement officer or otherwise engaged in the duties of enforcing any of the laws of this Common-

wealth...". This motion was denied.

The pre-trial record shows that on July 7, 1976 at the request of the Washington County Sheriff, the Circuit Court of Washington County, Virginia, by written order appointed Fonda B. Smith a fulltime correctional officer. The record further shows that on March 30, 1977, Fonda B. Smith was appointed by written order of the same court a fulltime judicial officer. The Circuit Court of Washington County issued no further orders indexed under the names, Fonda Smith or Fonda B. Smith. The record is silent regarding Fonda Smith's status as a fulltime correctional officer at the time she issued the search and arrest warrants involving the Petitioner. However, there is no letter of resignation or a written order relieving her of her appointment as a fulltime correctional officer. There is mentioned in an order dated March 30, 1977 of that court indexed under the name of Nellie Foster wherein Nellie Foster is appointed a

matron and deputy sheriff, replacing Fonda Smith.

The Supreme Court in Shadwick v. City of Tampa, 407 U.S. 345 (1972), held that an issuing magistrate must meet two tests: First, he must be neutral and detached, and second, he must be capable of determining whether probable cause exists for the requested arrest or search. The court recited that "whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." Id. at 350. It is clear from the records of the Circuit Court of Washington County, Virginia, that there has not been a final determination of Fonda Smith's status as a fulltime correctional officer. Therefore, the test of neutrality and detachment set forth in The Code of Virginia, 1950, which complies with the Shadwick holding was not met. The appointment of Fonda B. Smith as a judicial officer in the Twenty-Eighth

Judicial District for a term beginning April 1, 1977 and ending March 31, 1981 is null and void ab initio because of the earlier unrecinded and unmodified order of the same court appointing her a correctional officer on July 7, 1976.

V.

WOULD THE ISSUING OF ARREST AND SEARCH WARRANTS BY A JUDICIAL OFFICER WHO WAS ALSO A CORRECTIONAL OFFICER OF THE EXECUTIVE BRANCH VIOLATE PETITIONER'S RIGHT OF DUE PROCESS?

Lisenba v. California, 314 U.S. 219 (1941), held that a denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. "In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Id. at 236.

Here, the abuse of power complained of is the issuing of arrest and search war-

rants by a judicial officer who was also a correctional officer at the time. The Supreme Court in United States v. Di Re, 332 U.S. 581 (1948), held that the law of the place where an arrest is made shall determine its validity. As set forth above, the arrest and search warrants in Petitioner's trial were issued in violation of Section 19.2-37 of The Code of Virginia, 1950, as amended. The failure of the court to observe that which is essential to the very concept of justice and proceed upon the warrants over Petitioner's objection constitutes a denial of due process under the Fifth and Fourteenth Amendments to The United States Constitution.

CONCLUSION

The Virginia Supreme Court refused to grant review of the questions presented in this Petition. If the trial court of Washington County, Virginia is not to be a court of last resort with no appellate review available, then the only alternative is for The Supreme Court of the United States to review Petitioner's case.

Submitted by:

Cody W. Smith, Jr.
Walter Bilbro, Jr.
David H. Frackelton